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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NO. 649

JACKIE WASHINGTON,

Petitioner,

v.

THE STATE OF TEXAS

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TEXAS

BRIEF FOR RESPONDENT

QUESTION PRESENTED

Is Petitioner's conviction and sentence void because he was denied his rights under the Sixth and Fourteenth Amendments to the Constitution of the United States to have compulsory process in obtaining an available witness in his favor, namely, a Co-Defendant, charged and previously convicted under a separate indictment for the same transaction and which Co-Defendant, according to his Affidavit, could have exonerated Petitioner if such testimony were believed by the jury?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Article 82 of the Texas Penal Code provided as of the dates involved in this case:

"Parties to offense as witnesses

Persons charged as principals, accomplices or accessories, whether in the same or by different indictments, cannot be introduced as witnesses for one another, but they may claim a severance, and if one or more be acquitted they may testify in behalf of the others."

Article 711 of the Code of Criminal Procedure of 1925 provided as of the dates involved in this case:

"Principals, accomplices or accessories

Persons charged as principals, accomplices or accessories, whether in the same or different indictments, cannot be introduced as witnesses for one another, but they may claim a severance; and, if any one or more be acquitted, or the prosecution against them be dismissed, they may testify in behalf of the others."

The Sixth Amendment to the Constitution of the United States provides in part:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . ."

STATEMENT OF THE CASE

Respondent sees no useful purpose in setting forth an involved statement of facts. Of importance to this Court is the fact that the Trial Court refused to permit the Co-Defendant of Petitioner to testify over the objection of State's counsel on the trial of the cause. Trial Court's refusal was based on Article 711 of the Code of Criminal Procedure of 1925, *supra*.

SUMMARY OF ARGUMENT

Petitioner was not denied his Sixth Amendment

right to compulsory process because such right extends only to obtaining witnesses *in his favor*. The State of Texas, pursuant to its inherent sovereign powers, has established a procedural rule of evidence which in no way violates any provision of the Constitution of the United States.

ARGUMENT

Petitioner, in his brief, places principle reliance on the case of *Funk v. United States*, 290 U.S. 371 (1933). *Funk v. United States* was a case which was written on the question of whether or not a wife was competent to testify as a witness in behalf of her husband on a criminal trial in the United States District Court. The actions of the United States District Court were to be governed by the common law, and the opinion in *Funk* determined the status of the *common law* at the time of the trial.

At page 377 of the *Funk* opinion the following appears.

> "It is well to pause at this point to state a little more concisely what was held in these cases. It will be noted, in the first place, that the decision in the Reid Case *was not based upon any express statutory provision.*" (Emphasis added.)

Again at page 379 the opinion in *Funk* states:

> "Taking the two cases together, it is plain enough that the ultimate doctrine announced is that in the taking of testimony in criminal cases, the federal courts are bound by the rules of the common law as they existed at a definitely specified time in the respective states, *unless Congress has otherotherwise provided.*" (Emphasis added.)

And again at page 383 of the *Funk* opinion:

"The final question to which we are thus brought is not that of the power of the federal courts to amend or repeal any given rule or principle of the common law, for they neither have nor claim that power, but it is the question of the power of these courts, *in the complete absence of congressional legislation on the subject*, to declare and effectuate, upon common law principles, what is the present rule upon a given subject in the light of fundamentally altered conditions, without regard to what has previously been declared and practiced. It has been said so often as to have become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions." (Emphasis added.)

Thus we see that the *Funk* opinion clearly recognizes the right of a legislative body to establish a rule and only stands as authority for interpretation of the common law as it existed at the time of the decision and which was applicable in the *Funk* case. In the instant case, we have a definite statutory provision which ruled the testimony of a co-defendant unavailable on behalf of the Petitioner.

Petitioner does not herein claim that he attempted to issue processes to obtain a witness and that such process was itself refused. Petitioner's Co-Defendant was produced in court but his testimony was not permitted because the statutory provision of Article 711 of the Code of Criminal Procedure of 1925 prohibited the Co-Defendant from appearing in favor of the Petitioner. Clear reading of the Sixth Amendment to the Constitution of the United States shows that its purpose is to provide the compulsory process, *not favorable witnesses.*

Respondent urges the Court that this cause should be governed by the principles enunciated in

Nos. 68, 69, and 70.—October Term, 1966.

Cause No. 68 Leon Spencer, Appellant v. State of Texas	On Appeal From the Court of Criminal Appeals of Texas.
Cause No. 69 Robert A. Bell, Jr., Petitioner v. State of Texas	On Writ of Certiorari to the Court of Criminal Appeals of Texas.
Cause No. 70 William Everett Reed, Petitioner v. George J. Beto, Director, Texas Department of Corrections.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

all of which were delivered by this Court on January 23, 1967, and are not yet reported.

At page 9 of the Court's Opinion the following appears:

> "Cases in this Court have long acted on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. See, e.g., *Tumey v. Ohio*, 273 U.S. 510; *Betts v. Brady*, 316 U.S. 455; cf. *Gideon v. Wainwright*, 372 U.S. 335; see *Estes v. Texas*, 381 U.S. 532; *Sheppard v. Maxwell*, 384 U.S. 333; cf. *Grif-*

fin v. Illinois, 351 U.S. 12. But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority. In the face of the legitimate state purpose and the long-standing and widespread use that attend the procedure under attack here, we find it impossible to say that because of the possibility of some collateral prejudice the Texas procedure is rendered unconstitutional under the Due Process Clause as it has been interpreted and applied in our past cases. As Mr. Justice Cardozo had occasion to remark, a state rule of law 'does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar.' *Snyder v. Massachusetts,* 291 U.S. 97, 105. See also *Buchalter v. New York,* 319 U.S. 427."

And at page 14 the following appears:

"To take such a step would be quite beyond the pale of this Court's proper function in our federal system. It would be a wholly unjustifiable encroachment by this Court upon the Constitutional power of States to promulgate their own rules of evidence to try their own state-created crimes in their own state courts, so long as their rules are not prohibited by any provision of the United States Constitution, which these rules are not."

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully urges the Court to affirm the Judgment below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Howard M. Fender, Assistant Attorney General of the State of Texas, a member of the Bar of the Supreme Court of the United States, do now enter my appearance in the Supreme Court of the United States in the above captioned cause on behalf of the Respondent; I further certify that a copy of the foregoing Brief for the Respondent has been forwarded by United States Mails, first class, postage prepaid, to Mr. Charles W. Tessmer, 706 Main Street, Suite 400, Dallas, Texas 75202, Mr. Henry J. Novak, Jr., 706 Main Street, Suite 400, Dallas, Texas 75202, Mr. Emmett Colvin, Jr., Waldie, McDowell and Colvin, 1115

Fidelity Building, 1000 Main Street, Dallas, Texas 75202, Attorneys for Petitioner, this the 7 day of February, 1967.

Howard M. Fender

HOWARD M. FENDER
Assistant Attorney General